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Supreme Court, U.S.
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No. 98-542

In The

Supreme Court of the United States

October Term, 1998

DARREL D. SMITH,

Petitioner,

vs.

JOHN PETER LEE, LTD. and
TOM GRIMMETT, Chapter 7 Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TOM GRIMMETT, TRUSTEE

N. Patrick Flanagan
Counsel of Record
Lenard E. Schwartzer

HALE LANE PEEK DENNISON
HOWARD AND ANDERSON
Attorneys for Respondent
Tom Grimmett, Trustee
2300 West Sahara
Suite 800
Las Vegas, Nevada 89102
(702) 362-5118

149399

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Whether the provisions of Smith's plan provided that Smith's property did not revest in him upon confirmation of his plan of reorganization.

2. Whether the Ninth Circuit erred under 11 U.S.C. § 1112(b) in affirming the conversion of Smith's chapter 11 case to one under chapter 7 and vesting Smith's assets into a chapter 7 estate.

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RELEVANT STATUTES

11 U.S.C. § 348. Effect of conversion.

(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

(b) Unless the court for cause orders otherwise, in sections 701(a), 727(a)(10), 727(b), 728(a), 728(b), 1102(a), 1110(a)(1), 1121(b), 1121(c), 1141(d)(4), 1146(a), 1146(b), 1201(a), 1221, 1228(a), 1301(a), and 1305(a) of this title, "the order for relief under this chapter" in a chapter to which a case has been converted under section 706, 1112, 1208, or 1307 of this title means the conversion of such case in such chapter.

(c) Sections 342 and 365(d) of this title apply in a case that has been converted under section 706, 1112, 1208, or 1307 of this title, as if the conversion order were the order for relief.

. . . .

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title —

> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and
>
> (B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

> (2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

STATEMENT OF THE CASE

Darrel D. Smith ("Smith") filed for relief under chapter 11 of the Bankruptcy Code on or about March 22, 1991. An Order Confirming Debtor's Third Plan Of Reorganization (the "Plan") was entered on January 11, 1994. Smith's means for funding the Plan was: (1) litigation against the Doumani family for an interest in the proceeds from the sale of the Tropicana Hotel and Casino, and (2) the making and selling of prints of the painting *Daybreak* by the artist Maxfield Parrish, the original being owned by Smith. The Plan provided, in relevant part, that only

> If, sixty (60) months after confirmation, creditors are not substantially paid, or if the Debtor loses both litigations and there is insufficient profit from print[s] of *Daybreak* to pay all claims, the Debtor will arrange to sell or auction *Daybreak* to pay creditors. . . .

P. 39a of Petition For Writ Of Certiorari ("Petition").

On March 31, 1995, John Peter Lee, Ltd. ("Lee") moved to withdraw as Smith's counsel. The Bankruptcy Court granted Lee's motion to withdraw. Lee also moved to convert Smith's chapter 11 case to a case under chapter 7 and to require the sale of Smith's bankruptcy estate assets, particularly the painting *Daybreak*. On May 1, 1995, the court held a preliminary hearing on the motion to convert. The Bankruptcy Court denied Lee's motion without prejudice and set a status hearing for October 3, 1995. At this hearing, the Bankruptcy Court stated that Smith could not use the litigation as his sole source of payment but must produce prints of *Daybreak*. A second status hearing was set for October 24, 1995, to allow Smith to show that he was not in default of the Plan. At the October 24 hearing, the Bankruptcy Court ordered Smith to show, at a third hearing on January 23, 1996, that he had made "reasonable efforts to start producing prints and marketing them." The Bankruptcy Court also warned Smith that it would convert the case to one under chapter 7 if Smith had not made such efforts.

At the January 23, 1996 hearing, the Bankruptcy Court found that Smith had not made reasonable efforts to sell and market prints of *Daybreak* and granted Lee's motion to convert pursuant to 11 U.S.C. § 1112(b)(7) and (8). The court ordered that Smith's case be converted to one under chapter 7 and that a trustee be appointed. On February 6, 1996, an Order To Convert Case To Chapter 7 was filed. Tom R. Grimmett, Trustee (the "Trustee") was duly appointed as the chapter 7 trustee in Smith's case. Smith moved for reconsideration. The court denied this motion and stated that it rejected the holding of *In re T.S.P. Indus., Inc.*, 117 B.R. 375 (Bankr. N.D. Ill. 1990), and similar holdings, that postconfirmation conversion is not appropriate when the chapter 11 estate's assets have revested in the debtor. Pp. 29a-30a of Petition. Instead, the Bankruptcy Court held that "property of an estate does revest in the Debtor upon confirmation." However, when a chapter 11 case is converted to a chapter 7 case, the revested property "does become property of an estate, a Chapter 7 estate." P. 30a of Petition.

Smith appealed the Bankruptcy Court's order converting his case. The United States District Court for the District of Nevada affirmed. P. 9a of Petition. The District Court also rejected *T.S.P. Industries* and held that postconfirmation conversion is appropriate even when property of the debtor has revested in the debtor. The District Court stated that otherwise, "[a] debtor could . . . materially default or lose all ability to effectuate a plan and creditors would be entirely without remedy." P. 24 a of Petition.

Smith appealed the District Court's decision, and the Ninth Circuit affirmed. However, the Ninth Circuit affirmed based upon the provisions of Smith's Plan, grounds other than those cited by the lower courts. Applying its prior decision in *Hillis Motors, Inc. v. Hawaii Auto. Dealers Ass'n*, 997 F.2d 581 (9th Cir. 1993), the Ninth Circuit held that the provisions of Smith's Plan dictated that Smith's property, including *Daybreak*, did not revest in him upon confirmation.

In the meantime, the Trustee obtained authorization to sell Smith's largest asset, *Daybreak*, by auction at Sotheby's. *Daybreak* was sold at auction for approximately $3,900,000, and the proceeds from *Daybreak* netted Smith's estate approximately $3,700,000. This sum has been sufficient to pay all creditors in full with interest, and leave a substantial amount for distribution to Smith.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

Smith's petition for writ of certiorari should be denied because: 1) the Ninth Circuit's decision was based upon the specific facts and provisions of Smith's Plan; and 2) although there is conflicting case law with regard to the issue of whether upon conversion of a confirmed chapter 11 case to a case under Chapter 7, property of the debtor becomes property of the chapter 7 estate, this issue is not one of substantial importance.

REASONS FOR DENYING THE PETITION

Smith's petition should be denied because the Ninth Circuit based its holding upon the particular facts in the case before it. Specifically, the Ninth Circuit held that the provisions of Smith's Plan provided that *Daybreak* did not revest in Smith upon confirmation. As a result, when Smith's chapter 11 case was converted to one under chapter 7, *Daybreak* was included as part of Smith's chapter 7 estate.

Alternatively, the petition should be denied because, although there is conflicting case law with regard to the issue of whether upon conversion of a confirmed chapter 11 case to a case under Chapter 7, property of the debtor becomes property of the chapter 7 estate, this issue is not one of importance because the provisions of a plan can expressly determine the effect of conversion upon property of a debtor. Furthermore, Congress, if necessary, can resolve any confusion more effectively by amending the applicable statutes.

I.

THIS COURT SHOULD DENY THE PETITION BECAUSE THE NINTH CIRCUIT'S HOLDING IS BASED UPON THE PARTICULAR PROVISIONS OF SMITH'S CHAPTER 11 PLAN.

Smith contends that the bankruptcy court did not have jurisdiction over his assets after confirmation of his Plan pursuant to 11 U.S.C. § 1141(b) and (c) because confirmation of his plan vested all of his property in him free and clear of all intervening interests, and his Plan did not expressly provide otherwise. As a result, Smith asserts that because *Daybreak* vested in him upon confirmation of the Plan, the court did not have the authority to vest *Daybreak* in his chapter 7 estate.

Contrary to Smith's contentions, the Ninth Circuit found that the provisions of Smith's Plan provided that Smith's property did not revest in Smith upon confirmation. The Ninth Circuit's holding was based upon the plain meaning of 11 U.S.C. § 1141 and a prior decision, *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 589 (9th Cir. 1993).

A. The Plain Meaning Of 11 U.S.C. § 1141 Does Not Require That Express Provisions Exist To Prevent Revesting.

Smith contends that to prevent revesting of property in a debtor upon confirmation under 11 U.S.C. § 1141, a plan must expressly provide that property will not revest in the debtor upon confirmation. However, the plain meaning of 11 U.S.C. § 1141(b) does not require that a plan contain express provisions preventing revesting.

The "fundamental cannon [of] statutory interpretation begins with the language of the statute itself." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126 (1990). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S. Ct. 1146, 1149 (1992). If the statutory language is ambiguous, a court must then resort to examination of legislative history. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 1030 (1989).

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters."

Ron Pair Enters., Inc., 109 S. Ct. at 1031.

11 U.S.C. § 1141(b) and (c) provide:

> (b) *Except as otherwise provided in the plan or in the order confirming the plan*, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of

> all claims and interests of creditors, equity security holders, and of general partners in the debtor.

11 U.S.C. § 1141 (emphasis added). The plain language of § 1141 provides that unless "otherwise provided in the plan or the order confirming the plan" property revests in the debtor upon confirmation. Notably, § 1141 does not state "[e]xcept as otherwise **expressly** provided in the plan or order confirming the plan" property revests in the debtor. Absent the statutory requirement that a plan contain express language preventing revesting of property in the debtor, normal principles of contract interpretation are to be applied to determine a plan's meaning. As the Ninth Circuit stated:

> A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract. *See The Official Creditors Committee of Stratford of Texas, Inc. v. Stratford of Texas, Inc. (In re Stratford of Texas, Inc.)*, 635 F.2d 365, 368-69 (5th Cir. Unit A Jan. 1981); *see also Rufo v. Inmates of Suffolk County Jail*, __ U.S. __, __, 112 S. Ct. 748, 757, 116 L. Ed. 2d 867 (1992) (a consent decree has elements of both a judgment and a contract). Although a confirmed bankruptcy plan is a judgment rendered by a federal court in a case arising under federal law, because there is little need for a nationally uniform body of law regarding the interpretation of Chapter 11 plans and because state law is regularly incorporated into bankruptcy law, state law constitutes the federal rule of decision here and governs our interpretation of [the debtor's] plan. *See Kamen v. Kemper Financial Serv. Inc.*, __ U.S. __, __, 111 S. Ct. 1711, 1717, 114 L. Ed. 2d 152 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29, 99 S. Ct. 1448, 1458-59, 59 L. Ed. 2d 711 (1979); *Stratford*, 635 F.2d at 368-39.

Hillis Motors, Inc. v. Hawaii Automobile Dealers' Ass'n, 997 F.2d 581, 588 (9th Cir. 1993).

Applying the foregoing, the court in *Hillis Motors* applied applicable state law, Hawaii law, that a "legal agreement should be construed as a whole and its meaning determined from the entire context and not from any one part, word, phrase, or clause." *Hillis Motors*, 997 F.2d at 588. Based upon these principles, the court held

that a plan does not need express provisions that prevent property from revesting in the debtor. Instead, a plan is to be interpreted as a whole and may prevent vesting in the debtor even if "[t]he plan does not state in unambiguous terms that the property of the estate does not revest in the debtor." *Hillis Motors, Inc.*, 997 F.2d at 589.

Thus, the plain language of § 1141 does not dictate that a plan contain express provisions preventing revesting. In the absence of this statutory requirement, a plan is to be construed as a contract whereby its meaning is to be determined from its entire context.

B. The Ninth Circuit Applied The Plain Meaning Of 11 U.S.C. § 1141 To The Provisions Of Smith's Plan.

The Ninth Circuit applied the plain meaning of 11 U.S.C. § 1141 to the provisions of Smith's plan, and analyzing the provisions of Smith's plan, the Ninth Circuit applied its previous holding in *Hillis Motors*. In *Hillis Motors*, the Ninth Circuit specifically addressed the issue of whether the debtor's plan provided that it would remain property of the debtor's estate after confirmation. The court acknowledged that confirmation customarily revests property of the estate in the debtor unless the plan otherwise provides. However, the court noted that because a plan's provisions are to be interpreted as a whole under state law, it may prevent vesting in the debtor even if "[t]he plan does not state in unambiguous terms that the property of the estate does not revest in the debtor." *Hillis Motors*, 997 F.2d at 589.

In reaching its determination, the court made the following observations and conclusions about the debtor's plan of reorganization:

> Hillis' first reorganization plan was atypical. The plan did not grant Hillis a discharge but specifically contemplated that any discharge of its debts would occur in the future. The plan did not return control of Hillis to the company's sole stockholder, D. Hillis; but it did not transfer the assets of the company to another entity either. Instead the trustee, as the representative of the bankruptcy court, retained management and control over Hillis' business. Hillis was not free to do what it pleased with its assets and property but rather the distribution of the company's profits was strictly controlled. Unusually, the reorganization plan also

> provided that the bankruptcy court would be involved in the administration of the estate after confirmation.
>
> In essence, Hillis' plan provided that the business would be conducted under court supervision via the trustee until all of Hillis' creditors were paid. While day-to-day business decisions were to be made by Rowley [Hillis' C.E.O], the corporation continued to operate under the aegis of the court and the oversight of the trustee. Rowley also contributed the investment capital to operate the business (for which he was to receive reimbursement) and he was granted compensation for his services. Nevertheless, Hillis' plan makes clear that the purpose of the continued operation of the business was to pay back the company's creditors under the supervision of the court. Only after the payment of all claims and expenses of the estate would Rowley be allowed to seek permission from the estate to obtain Hillis' automobile broker's license and operate the business as the new owner free and clear of judicial intervention. Although there was a confirmed plan, the reorganization process continued post-confirmation. Hillis was not free to deal with its property and the world as it would have been if it had not been subject to the jurisdiction of the bankruptcy court. *Cf.* [*Cunningham v.*] *Healthco,* [*Inc.*], 824 F.2d [1448] at 1460 [5th Cir. 1987].

Hillis Motors, 997 F.2d at 589 (footnote omitted). Thus, the debtor's confirmed plan provided that: 1) the management and control of the debtor business would remain in the trustee's hands; 2) a fixed percentage of the company's postconfirmation profits "were to be paid to the estate for disbursement as ordered by the bankruptcy court"; and 3) "[t]he bankruptcy court retained jurisdiction to insure that the purpose and intent of the plan were carried out." *Hillis Motors*, 997 F.2d at 587. Based upon its "analysis of the language, purposes, and context of Hillis' first reorganization plan," the court concluded that the debtor's corporate property remained part of the estate. *Hillis Motors*, 997 F.2d at 590.

Applying the analysis set forth in *Hillis Motors*,[1] the Ninth Circuit examined Smith's Plan, giving meaning to all its provisions,[2] and found *Daybreak* did not revest in Smith upon confirmation. Specifically, the court stated:

> Smith's reorganization plan provided that his creditors "will receive [payments] on account of their claim as soon as funds are available [from the sale of prints of Daybreak]. . . . If, sixty (60) months after confirmation, secured creditors have not been substantially paid, Debtor will make arrangements to sell or auction the painting *Daybreak*." Thus, *Daybreak* did not vest in Smith free and clear of all intervening interests upon confirmation. Instead, Smith's creditors retained a contingent interest in the painting.
>
> Moreover, as the district court pointed out, Smith's reorganization plan explicitly provides that the bankruptcy court "shall continue to retain exclusive jurisdiction over these proceedings until the provisions of the plan have been fully performed for the following purposes . . . (6) supervising the enforcement of the plan; and (7) for such other purposes as the court shall determine." In order to supervise the enforcement of the plan, the bankruptcy court had to have the authority to enforce its provisions. Thus, the bankruptcy court necessarily had jurisdiction over

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1. The Ninth Circuit was bound to follow the precedent set forth in *Hillis Motors* and applied its holding properly. *Fireman's Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336, 1337 n.1 (9th Cir. 1998), *cert. denied*, __ U.S. __, 1998 WL 334029 (1998) (the Ninth Circuit is bound to follow Ninth Circuit precedent); *Landreth v. Internal Revenue Service*, 859 F.2d 643, 648 (9th Cir. 1988) ("we are not normally free to reconsider controlling Ninth Circuit precedent."); *United States v. Smith*, 628 F.2d 1260, 1261 (9th Cir. 1980) ("[w]e are bound to follow the precedent of this circuit.").

2. Nevada law follows the same principles for contract interpretation. A contract must be construed as a whole and "every word must be given effect if at all possible." *Royal Indemnity Co., Inc. v. Special Service Supply Co. Inc*, 82 Nev. 148, 149, 413 P.2d 500, 502 (Nev. 1966). *See also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 115 S. Ct. 1212, 1219 (1995) (a cardinal principle of contract construction is "that a document should be read to give effect to all its provisions and to render them consistent with each other.").

> Smith's assets to require him to distribute the funds from proceeds of the sale of prints of *Daybreak* or to force Smith to sell *Daybreak* if he was unable to repay his creditors. Therefore, Smith "was not free to deal with [his] property and the world as [he] would have been if [he] had not been subject to the jurisdiction of the bankruptcy court." *Id.* [Hillis Motors, 997 F.2d] at 589.

Pp. 5a-6a of Petition.

Thus, as demonstrated and determined by the Ninth Circuit, the provisions of Smith's plan provide that *Daybreak* did not revest in Smith. Therefore, the Ninth Circuit's holding, which is based upon the particular provisions of Smith's plan, does not provide a sufficient basis for this court to grant Smith's Petition.

1. *The Ninth Circuit Did Not Rely Solely Upon The Plan's Jurisdictional Provisions In Its Determination That Daybreak Remained Property Of The Estate Nor Did It Fail To Recognize 11 U.S.C. § 1141(c).*

Smith contends that:

> [T]he Ninth Circuit concluded that, in order for the Bankruptcy Court to retain jurisdiction necessary to enforce the plan, the assets of Smith's chapter 11 estate must not have fully revested in him upon confirmation.
>
> In holding that the Plan's jurisdictional provisions affected the revesting of the property in Smith's estate under Bankruptcy Code section 1141(b), the Ninth Circuit nonsensically equated jurisdiction with property of the estate. This holding conflicts with the plain statutory language governing bankruptcy court jurisdiction, as well as with the holdings of numerous other courts.

P. 14 of Petition. In addition, Smith alleges that:

> By holding that property of a chapter 11 estate does not revest in the reorganized debtor when creditors retain interests in that property, the Ninth Circuit ignores the relationship between section 1141(b), which governs

> revesting and section 1141(c), which governs encumbrances that remain on revested property postconfirmation.

P. 20 of Petition.

Smith is parsing the Ninth Circuit's holding to create a nonexistent conflict with case law and § 1141. The Ninth Circuit did not rely solely upon the Plan's jurisdictional provisions in its determination that *Daybreak* remained property of the estate, nor did it fail to recognize 11 U.S.C. § 1141(c). Instead, the Ninth Circuit analyzed Smith's Plan as a whole as required by principles of contract law.

Upon consideration of all Plan provisions, the Ninth Circuit noted as follows:

> Smith's reorganization plan provided that his creditors "will receive [payments] on account of their claim as soon as funds are available [from the sale of prints of Daybreak]. . . . If, sixty (60) months after confirmation, secured creditors have not been substantially paid, Debtor will make arrangements to sell or auction the painting *Daybreak*." Thus, *Daybreak* did not vest in Smith free and clear of all intervening interests upon confirmation. Instead, Smith's creditors retained a contingent interest in the painting.

In conjunction with these provisions, the Ninth Circuit considered the Plan's jurisdictional provisions and stated:

> *Moreover*, as the district court pointed out, Smith's reorganization plan explicitly provides that the bankruptcy court "shall continue to retain exclusive jurisdiction over these proceedings until the provisions of the plan have been fully performed for the following purposes. . . (6) supervising the enforcement of the plan; and (7) for such other purposes as the court shall determine."

P. 6a of Petition (emphasis added).

As a result of these provisions, the Ninth Circuit concluded:

> In order to supervise the enforcement of the plan, the bankruptcy court had to have the authority to enforce its provisions. Thus, the bankruptcy court necessarily had

> jurisdiction over Smith's assets to require him to distribute the funds from proceeds of the sale of prints of *Daybreak* or to force Smith to sell *Daybreak* if he was unable to repay his creditors. Therefore, Smith "was not free to deal with [his] property and the world as [he] would have been if [he] had not been subject to the jurisdiction of the bankruptcy court." *Id.* [*Hillis Motors*, 997 F.2d] at 589.

Pp. 5a-6a of Petition.

The Ninth Circuit's analysis demonstrates that it considered the provisions of the Plan as a whole. Based upon this analysis, the Ninth Circuit found that the provisions regarding payment to creditors from one source, *Daybreak*, in addition to the jurisdictional provisions, established that *Daybreak* did not revest in Smith. Thus, the Ninth Circuit did not base its determination solely upon the jurisdictional provisions of the Plan. Likewise, it did not base its determination solely upon its holding that Smith's creditors retained a contingent interest. Instead, it considered the totality of the provisions of the Plan as required.

In addition to the foregoing provisions, other provisions of Smith's plan demonstrate that Smith's property did not revest in him upon conversion. The plan provides:

> (e) *Additional Provisions Consented to by Debtor.* In addition to the foregoing, Debtor consents to the following provisions and consents to their inclusion in any order of the court, including the order of confirmation:
>
> . . .
>
> (2) that if the Debtor defaults in any terms of the Plan, the court upon hearing after notice to Debtor, the creditors and such other persons as the court may direct, may enter an order either adjudging the Debtor bankrupt or directing the bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Code, as amended, or dismissing the proceedings, whichever in the opinion of the court may be in the best interest of creditors, and the amount of all claims shall be reinstated in their allowed amount, crediting only payments received thereon.

Thus, upon default under the Plan, including the failure to substantially pay secured creditors within sixty months after confirmation, Smith's case could be converted to allow payment from *Daybreak*.

Accordingly, the Ninth Circuit properly based its decision upon the particular facts and provisions contained in Smith's Plan as a whole. As a result, the Ninth Circuit's holding did not erroneously interpret statutory authority or case law. Smith is merely attempting to mischaracterize and parse the Ninth Circuit's decision by arguing that it conflicts with § 1141(c) and with authority pertaining to jurisdiction to bootstrap his argument that the Ninth Circuit's decision conflicts with statutory authority and case law.

II.

EVEN IF THE NINTH CIRCUIT HAD NOT BASED ITS DECISION UPON THE SPECIFIC PROVISIONS OF SMITH'S PLAN, INTERPRETATION OF THE RELEVANT STATUTES DICTATES THAT SMITH'S PROPERTY VESTED IN THE CHAPTER 7 BANKRUPTCY ESTATE UPON CONVERSION OF HIS CHAPTER 11 CASE.

Smith contends that this Court should grant his petition because the Ninth Circuit failed to apply the majority view that postconfirmation conversion to chapter 7 does not result in the vesting of assets in the chapter 7 estate. Although the Ninth Circuit did not specifically address this issue because it decided the case upon the facts and provisions in the Plan, the Ninth Circuit did affirm the District Court which had held that upon conversion of a chapter 11 case to a chapter 7 case, the debtor's assets vest in the chapter 7 estate.

Although there may be a conflict among courts with regard to this issue, it is not of one of substantial importance. Resolution of Smith's contentions are resolved by application of the plain meaning of the following sections of the Bankruptcy Code, 11 U.S.C. §§ 348, 541, 1112, and 1141, and by policy considerations. However, resolution of these issues can be performed by including provisions in a plan of reorganization addressing the effect of conversion on a debtor's property. In addition, Congress can amend the statutory framework to resolve any confusion with regard to this issue.

A. The Plain Meaning Of 11 U.S.C. §§ 348, 541, 1112, And 1141 Dictates That Upon Conversion Of A Chapter 11 Case To A Chapter 7 Case The Debtor's Assets Vest In The Chapter 7 Estate.

1. *Analysis Of Statutory Framework.*

As previously stated, analysis of a statute begins with its plain meaning. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126 (1990); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S. Ct. 1146, 1149 (1992). The plain meaning is conclusive, "except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 1031 (1989). "In such cases, the intention of the drafters, rather than the strict language, controls." 109 S. Ct. at 1031.

Statutory analysis must begin with 11 U.S.C. § 1141(b). Section 1141(b) pertains to confirmation and provides "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Thus, pursuant to § 1141(b), unless the plan or the order confirming the plan provides otherwise, upon confirmation a debtor is revested with property of the debtor's estate. However:

> The confirmation of a plan . . . does not necessarily dispose of the bankruptcy case. Instead, the case generally remains pending even after confirmation until the plan is substantially consummated and a final decree is entered. Therefore, it appears that the case continues even though all property of the estate has been vested in the reorganized debtor pursuant to Section 1141(b).

In re Calania Corp., 188 B.R. 41, 43 (Bankr. M.D. Fla. 1995). Thus, the "[t]he confirmation of a Chapter 11 plan does not automatically terminate the jurisdiction of the bankruptcy court." *Chase Manhattan Bank, N.A. v. Sultan Corp. (In re Sultan Corp.)*, 81 B.R. 599, 602 (9th Cir. BAP 1987). *See also, Goodman v. Phillip R. Curtis Enters., Inc.*, 809 F.2d 228, 232 (4th Cir. 1987) (Bankruptcy Code § 1142 "limits the authority of the court to matters concerning the implementation or execution of a confirmed plan."); *Blair v. Finan (In re Elless Co.)*, 174

F.2d 925, 929 (6th Cir. 1949), *cert. denied*, 338 U.S. 824, 70 S. Ct. 70 (1949) ("[i]n confirming a plan of reorganization, the court may only retain jurisdiction in order to protect its decree, to prevent interference with the execution of the plan, and to aid otherwise in its operation. . . ."); *Spiers Graff Spiers v. Menako (In re Spiers Graff Spiers)*, 190 B.R. 1001, 1007 (Bankr. N.D. Ill. 1996); *In re Cinderella Clothing Indus., Inc.*, 93 B.R. 373, 377 (Bankr. E.D. Pa. 1988).

11 U.S.C. § 1112 provides in relevant part:

> (b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, *the bankruptcy court may convert a case under this chapter to a case under chapter 7 of this title* or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause including —
>
> . . . .
>
> . . . .
>
> (7) inability to effectuate substantial consummation of a confirmed plan;
>
> (8) material default by the debtor with respect to a confirmed plan;
>
> (9) termination of a plan by reason of the occurrence of a condition specified in the plan[.]

11 U.S.C. § 1112 (emphasis added). Section 1112(b), which pertains to conversion for a chapter 11 case to a chapter 7 case, clearly demonstrates that a bankruptcy court retains jurisdiction to convert or dismiss a case even though a plan has been confirmed. Thus, the plain language of § 1112(b) "clearly contemplates the conversion of a Chapter 11 case following confirmation of the chapter 11 plan." *In re Calania Corp.*, 188 B.R. at 43.

Section 348(a) sets forth the effect of conversion, providing:

> *Conversion* of a case from a case under one chapter of this title to a case under another chapter of this title constitutes

> an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, *does not effect a change in the date of* the filing of the petition, *the commencement of the case*, or the order for relief.

11 U.S.C. § 348 (emphasis added). Accordingly, under § 348(a) two postulates are created. First, conversion is an order for relief. Second, and more significantly, except as otherwise set forth in §§ 348(b) and (c) which are not applicable, conversion does not change the date of the filing of the commencement of the case. That is, this date does not change because of a conversion.

The phrase "commencement of the case" contained in § 348 is extremely significant. The date of the "commencement of the case" is used to determine what constitutes property of the debtor's bankruptcy estate. *See* 11 U.S.C. § 541(a). Specifically, § 541(a) defines "property of the estate" as follows:

> The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> > (1) Except as provided in subsections (b) and (c)(2) of this section, *all legal or equitable interests of the debtor in property as of the commencement of the case.*

11 U.S.C. § 541 (emphasis added). There is no language in § 1112(b) that redefines property of the estate or when it is determined. Thus, even after conversion, the estate consists of property of the debtor determined as of the commencement of the case. *Calania*, 188 B.R. at 42.

> It would therefore appear from the combined operation of Section 541 and Section 348 that the conversion of a case does not affect the scope of the property of the estate in the converted case, since that property had been fixed as of the date of the original filing.

Calania, 188 B.R. at 42-43.

Therefore, the plain language of § 1141(b), § 1112, § 348, and § 541(a) demonstrates that Congress intended that (1) a confirmed chapter 11 case could be converted to a case under chapter 7, and (2) in that event, the property of the estate would include the property that the debtor held as of the commencement of the case; that is, on the date he or she filed the petition for bankruptcy relief. These statutes expressly provide that, even though a debtor converts his case to another chapter under the Bankruptcy Code, the conversion does not change the date of the commencement of the case. And, the date of the commencement of the case serves as the date as for which the property of the estate is determined.

Although upon confirmation of a chapter 11 plan property of the bankruptcy estate vests in a debtor (absent plan provisions that provide otherwise), § 348 which governs the effect of conversion is controlling under the fundamental tenet of statutory construction that a specific statute governs over a general statute.

> [A] court should not construe a general statute to eviscerate a statute of specific effect. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031, 2037, 119 L. Ed. 2d 157 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Franklin v United States*, 992 F.2d 1492, 1502 (10th Cir. 1993) ("[A] specific statute . . . should not be deemed controlled or nullified by a general statute . . . absent a definite contrary intention."); 2A Norman J. Singer, *Sutherland Statutory Construction*, § 46.05, at 105 (5th ed. 1992) ("Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.").

State Bank of Southern Utah v. Gledhill (In re Gledhill), 76 F.3d 1070, 1078 (10th Cir. 1996). The express language of § 348(a) is specific. It pertains exclusively to the effect of conversion and thus governs over § 1141(b). Although § 348 may be characterized as a procedural statute as opposed to a substantive statute, it dictates the effect that conversion has on a debtor, a debtor's rights, creditors, and a creditor's rights.

Moreover, there are no contradictory provisions under the Code that dictate a different analysis. Section 1141(b) contains no language

which specifically applies in the event of conversion or contradicts § 348. And, in fact, other Code provisions bolster this analysis. Sections 1112(b)(7) and (8) provide for the conversion of a case even after confirmation of a plan for "cause."

However, despite § 1112(b)(7) or (8), under Smith's analysis a confirmed plan would never be converted because the property held by a reorganized debtor pursuant to the plan could never become available to creditors in the event of conversion. A debtor would still hold his pre-petition assets and the trustee would hold title to nothing. Thus, any conversion under the statute would be worthless to creditors and would allow a debtor to intentionally default on his plan of reorganization without losing his assets upon conversion. *Smith v. John Peter Lee, Ltd. (In re Smith)*, 201 B.R. 267, 273 (D. Nev. 1996). Certainly, this could not be the result intended by the drafters of § 1112(b). As the court noted in *Calania*:

> [I]t would be utterly pointless to make a provision for the conversion of an aborted Chapter 11 case to a Chapter 7 case if by virtue of Section 1141 there would not be any assets for the Chapter 7 trustee to administer. A careful analysis of the Code provisions permits only one conclusion that properties which were subject to the confirmed plan that is properties in which the Debtor had a cognizable legal or equitable ownership interest on the date of confirmation will be properties of the estate in a Chapter 7 case, but properties which are clearly acquired by the Debtor post-confirmation will not be subject to administration by the Chapter 7 trustee.

Calania, 188 B.R. at 43.

Another case on point is *In re NTG Indus., Inc.*, 118 B.R. 606 (Bankr. N.D. Ill. 1990). *NTG* involved a post-confirmation conversion of a chapter 11 case to chapter 7. Under the confirmed plan, certain preference actions were given to the creditors' committee for prosecution and collection with the proceeds to be divided among the unsecured creditors. The court recognized that upon confirmation, the estate ceased to exist. *NTG Indus., Inc.*, 118 B.R. at 610. However, the Court found that upon conversion, the rights held by the reorganized debtor "passed to the Trustee under the broad umbrella of section 541(a)(1) or section

541(a)(6), as proceeds of or from property of the estate." *NTG Indus., Inc.*, 118 B.R. at 610. The court stated:

> Someone has to complete the administration of the preference proceeds and possibly pursue additional preference actions. Furthermore, someone may need to pursue additional preference actions under sections 544 and 548 which neither the Committee, T&Z [the Committee's counsel] nor the Debtor have brought to date.
>
> . . . . The Trustee succeeds to the remaining property of the estate upon conversion, subject to existing unavoidable liens, encumbrances and claims against it.

NTG Indus., Inc., 118 B.R. at 612.

Nonetheless, despite the plain language of the applicable statutes, courts have reached contrary conclusions. *See Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458 (6th Cir. 1991); *In re K&M Printing, Inc.*, 210 B.R. 583 (Bankr. D. Ariz. 1997); *In re Winom Tool & Die, Inc.*, 173 B.R. 613 (Bankr. E.D. Mich. 1994); *In re T.S.P. Indus., Inc.*, 117 B.R. 375 (Bankr. N.D. Ill. 1990). *T.S.P.* supports Smith's argument that a debtor's property does not become part of a new chapter 7 estate. In *T.S.P.*, the debtor's chapter 11 plan had been confirmed. The U.S. Trustee moved to convert or dismiss the case because of the reorganized debtor's failure to make payments required by the plan. Rather than converting the debtor's case, the court dismissed it because it had found that the chapter 7 trustee would not have any assets to distribute to the creditors. *TSP Indus., Inc.*, 117 B.R. at 379. Specifically, the court stated that "the conversion of this case to a case under chapter 7 would not create a new estate or convert property of the Debtor into property of the estate." *TSP Indus., Inc.*, 117 B.R. at 378.

In reaching this conclusion, the court in *T.S.P.* failed to analyze the plain language of all the applicable sections of the Bankruptcy Code. Instead, the court based its decision primarily upon § 1141(b). The *T.S.P.* court did not consider the plain language of § 541 and § 348 which specifically pertain to the effect of conversion and property of the estate. The court's failure to consider § 541 and § 348 is demonstrated by its illogical statement that it could cite

circumstances where conversion of a chapter 11 case would be in the best interests of creditors and therefore would be warranted. *See T.S.P. Indus., Inc.*, 117 B.R. at 379. For instance, the court stated that there may be no "significant" assets in the estate except for a potential preference or fraudulent conveyance action which occurred prior to the commencement of the case. Under these circumstances, the case should be converted because "the chapter 7 trustee could exercise his or her powers to recover property that, under 11 U.S.C. § 541(a)(3), would become property of the estate for the benefit of creditors." *T.S.P. Indus., Inc.*, 117 B.R. at 379. Thus, the *T.S.P.* court's reasoning is faulty and contradictory. It used the date of commencement of the case to determine property of the estate despite the fact that it did not use this date to determine that physical property owned on that date became property of the estate upon conversion.

Thus, it is obvious that the court in *T.S.P.* arbitrarily applied statutory language and did not follow the dictates of the Supreme Court requiring that the plain meaning of the language of a statute be considered for statutory interpretation. Therefore, the holding in *T.S.P.* is not persuasive.

The other cases cited by Smith are likewise unpersuasive because these courts failed to apply the rules for statutory analysis to each of the statutes that are applicable.

2. *Policy Considerations.*

Policy concerns underlying the Bankruptcy Code also support the foregoing statutory analysis. If a bankruptcy court did not have the authority to convert a chapter 11 case and hold that the debtor's property vested in a chapter 7 estate, "[a] debtor could . . . materially default or lose all ability to effectuate a plan and creditors would be entirely without remedy." *Smith*, 201 B.R. at 274. As courts have stated, when a debtor's attempt at reorganization proves to be

> [U]navailing "no reason of policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts. . . ."

Cf. Bobroff v. Continental Bank (In re Bobroff), 766 F.2d 797, 803 (3d Cir. 1985) (involving a chapter 13 case; quoting *In re Hannan*, 24 B.R.

691, 692 (Bankr. E.D.N.Y. 1982)). Or as stated in the *NTG Indus., Inc.* case, "someone" has to administer the assets when the reorganized debtor has failed to execute its plan. *NTG Indus., Inc.*, 118 B.R. at 612.

If a creditor whose rights have been established under a confirmed plan cannot convert the chapter 11 case and pursue a debtor's assets in bankruptcy court, a creditor is forced to start all over and pursue its rights in state court. As a result, a creditor is not restored to the position it would have been in if a debtor would have never sought to repay his debts. Instead, a creditor who has established its rights under the bankruptcy court's jurisdiction must now protect its rights again and enforce these rights in state court, a court unlike the bankruptcy court, which is not familiar with the history and negotiations between the parties. Consequently, a creditor is left chasing the debtor in state court, expending additional time and money, pursuing a claim that in likelihood has been compromised under the debtor's plan. This is a result which is often not economically worthwhile and will, therefore, not be pursued.

The Bankruptcy Code was not drafted to allow for such a result. The Code was drafted to offer honest debtors a "fresh start." It was not drafted to allow debtors the opportunity to drag creditors through protracted, expensive court proceedings in the federal and state court systems. Accordingly, policy reasons underlying the Code also support the statutory analysis that a bankruptcy court has jurisdiction to convert a chapter 11 case in which there is a confirmed plan of reorganization and to vest the legal and equitable interests of the debtor as of the commencement of the case in a chapter 7 trustee.

B. The Issue Of Whether Upon Conversion Of A Chapter 11 Case To A Chapter 7 Case A Debtor's Property Becomes Property of the Chapter 7 Estate Is Not Of Substantial Importance To Warrant Granting Smith's Petition.

1. *Any Confusion About The Effects Of Conversion Can Be Resolved Pursuant To A Plan's Provisions.*

Any confusion about the effect of conversion can be resolved pursuant to the provisions of the plan of reorganization. That is, a plan can be drafted to include provisions pertaining to the effect of confirmation upon property of the debtor and the effect of conversion upon property of the estate.

As previously stated, 11 U.S.C. § 1141 provides that as "except as set forth in the plan or in the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."

> The effect of confirmation under the plain language of § 1141(a) is to bind all parties to the terms of the plan. It binds not only creditors but debtors as well. In essence, a confirmed plan is a binding contract and is res judicata as to all issues decided. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938); *Paul v. Monts*, 906 F.2d 1468 (10th Cir. 1990) (holding that confirmation of a Chapter 11 plan creates a binding contract which may be enforced in state court). This is true even if the plan is not consummated and the Chapter 11 is converted to Chapter 7. *See In re Blanton Smith Corp.*, 81 B.R. 440 (Bankr. M.D. Tenn. 1987). Once a plan is confirmed, neither a debtor nor a creditor may assert rights that are inconsistent with its provisions. *In re Riverside Nursing Home*, 137 B.R. 134 (Bankr. S.D.N.Y. 1992). *See also Republic Supply Company v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987); *In re Stratford of Texas, Inc.*, 635 F.2d 365 (5th Cir. 1981); *In re Dooley*, 116 B.R. 573 (Bankr. S.D. Ohio 1990); *In re Moussa*, 95 B.R. 449 (Bankr. N.D. Tex. 1989); *In re Astroglass Boat Co., Inc.*, 32 B.R. 538 (Bankr. M.D. Tenn. 1983).

In a thorough discussion of the binding effect of a confirmed plan, the Court in *In re Blanton Smith Corp., supra* stated:

> > [T]he Supreme Court [has] determined that the order confirming a plan of reorganization is *res judicata*. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938), *reh den'd*, 305 U.S. 675, 59 S. Ct. 250, 83 L. Ed. 437 (1938). In subsequent decisions, the courts of other circuits, relying on *Stoll*, have held a confirmation order to be equivalent to a judgment. In *Miller v. Meinhard-Commercial Corporations*, 462 F.2d 358, 360 (5th Cir. 1972), the Fifth Circuit stated:

> An arrangement confirmed by a bankruptcy court has the effect of a judgment rendered by a district court, and any attempt by the parties or those in privity with them to relitigate any of the matters that were raised or could have been raised therein is barred under the doctrine of *res judicata*. (Citations omitted).

81 B.R. at 442.

The binding effect of a confirmed plan extends to provisions that are later determined to be inconsistent with bankruptcy law. As the court stated in *Republic Supply Company v. Shoaf, supra*:

> Regardless of whether that provision is inconsistent with the bankruptcy laws or within the authority of the bankruptcy court, it is nonetheless included in the Plan, which was confirmed by the bankruptcy court without objection and was not appealed.

815 F.2d at 1050.

Johnson v. Laing (In re Laing), 146 B.R. 482, 484-85 (Bankr. N.D. Okla. 1992) (footnote omitted; emphasis added), *aff'd*, 31 F.3d 1050 (10th Cir. 1994).

Thus, a plan can provide provisions that relate to the effect of conversion and its effect on the debtor's property, and the debtor and creditors will be bound by these provisions. This is true regardless of whether or not such provisions are inconsistent with other provisions of the Bankruptcy Code such as 11 U.S.C. § 541. In this case, the Plan provided that upon Smith's default in consummating the Plan, the Court could "adjudge" Smith "bankrupt" and order the case "proceeded with pursuant to the provisions of the Bankruptcy Code."

Accordingly, § 1141 already provides a remedy for any possible confusion arising from the effect of conversion upon a confirmed chapter 11 case to a case under chapter 7 of the Bankruptcy Code. As a result, the conflict among courts with regard to this issue does not create an issue of importance necessary to warrant granting Smith's petition.

2. *Congress Can Resolve Any Confusion By Amending The Applicable Statutes.*

Because the statutory scheme drafted by Congress is so complex, Congress is the appropriate body to resolve the conflict among courts with regard to the issue of whether upon conversion of a confirmed chapter 11 case to a chapter 7 case the debtor's property becomes property of the chapter 7 estate. In fact, Congress resolved similar confusion and clarified contradictory case law pertaining to conversion under Chapter 13. Specifically, Congress amended 11 U.S.C. § 348 and added subsection (f).[3] Section 348(f) provides:

> (f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title —
>
> > (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and
> >
> > (B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.
>
> (2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

Thus, if a chapter 13 reorganization case is converted to any other chapter, property of the estate includes all property belonging to the debtor as of the date of the filing of the petition that the debtor still possesses.

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3. The legislative history provides that "[t]his amendment would clarify the Code to resolve a split in the case of law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7." 140 Cong. Rec. H 10,770 (October 4, 1994). Thus, § 348(f) does not serve to *change* existing law pertaining to conversion, but merely serves to *clarify* existing law.

As Congress stated:

> This amendment would clarify the Code to resolve a split in the case of law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 (and chapter 12), any property acquired after the petition becomes property of the estate, at least until confirmation of a plan. Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate does not apply to chapter 7. Other courts have held that the property of the estate in a converted case is the property the debtor had when the original chapter 13 petition was filed.
>
> These latter courts have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 for the unsecured creditor and the debtor would lose the home.
>
> This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

140 Cong. Rec. H 10,770 (October 4, 1994).

This statutory amendment is significant in that, although under § 1327(b)(2) property of the debtor revests in the debtor upon

confirmation unless otherwise provided,[4] Congress drafted this statute to include property that the debtor had a legal or equitable interest in on the date of the filing of the petition. Therefore, although this statute does not pertain to chapter 11, it demonstrates the process that Congress intends to be undertaken when there is a conversion. That is, upon conversion, property of the estate includes all interests of the debtor that existed as of the date of commencement of the petition that the debtor retained as of the date of conversion. In addition, in drafting this statute, Congress recognized the need to create a provision to deal with a debtor's bad faith.

CONCLUSION

The Ninth Circuit based its decision upon the particular provisions of Smith's Plan and applicable law. Its determination is not contrary to the plain language of the Bankruptcy Code and decisions interpreting the Code. Thus, because the Ninth Circuit based its decision upon the particular provisions of Smith's Plan, this Court should deny granting Smith's petition.

Furthermore, to the extent that the Ninth Circuit improperly interpreted the provisions of Smith's Plan, the plain language of the Bankruptcy Code dictates that upon conversion of a confirmed chapter 11 case to a case under chapter 7, property of the debtor becomes property of the chapter 7 estate.

Respectfully submitted,

N. Patrick Flanagan
Counsel of Record
Lenard E. Schwartzer
HALE LANE PEEK DENNISON
HOWARD AND ANDERSON
Attorneys for Respondent
Tom Grimmett, Trustee
2300 West Sahara
Suite 800
Las Vegas, Nevada 89102
(702) 362-5118

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4. Under chapter 13, property also revests upon confirmation. 11 U.S.C. § 1327(b).